IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1722 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

J K RASANIA

Versus

GUJARAT HOUSING BOARD

Appearance:

1. Special Civil Application No. 1722 of 1999

MRS SANGEETA N PAHWA for Petitioner No. 1

MR YF MEHTA for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 23/10/2002

ORAL JUDGEMENT

1. The petitioner herein has challenged the order of

his compulsory retirement {Annexure 'D' to the petition) passed by the Competent Authority, under Rule 161 (1) of the Bombay Civil Services Rules, 1959.

2. In order to appreciate the controversy before the Court, it is first necessary to examine certain relevant facts.

2.1 The petitioner had joined the service of the respondent-Board and was, at an appropriate stage, appointed as Junior Engineer by an order passed by the respondent dated 11th August 1972. Thereafter, he was promoted to the post of Deputy Executive Engineer with effect from 25th October 1982. Thereafter, he was further promoted to the post of Executive Engineer with effect from 18th July 1992, and was confirmed on the said post with effect from 1st April 1994. It requires to be noted that these facts are not in dispute.

2.2 The petitioner was thereafter placed under suspension (pending inquiry) by an order dated 6th August 1998. Two sets of charges were levelled against the petitioner. One Charge Sheet dated 9th September 1997 was issued (Annexure 'A' to the petition) and another Charge Sheet dated 10th November 1997 was issued against him (Annexure 'B' to the petition). The fact that there were two separate Charge Sheets issued to the petitioner is relevant in the context of the further discussion.

2.3 The respondent thereafter issued an order dated 23rd January 1998 (Annexure 'C' to the petition) which appears to be a general order pertaining to various inquiries pertaining to various acts and affecting many delinquents, to the effect that on the date of the said order, the Inquiry Officer had not been appointed and that as and when an Inquiry officer will be appointed, the inquiries shall proceed. It appears that the petitioner was governed by the said order in view of the fact that the petitioner's name is found in the annexure to the said order. What requires to be noted is that according to the petitioner, this order pertained to the inquiry arising from the first Charge Sheet at Annexure 'A', and that this inquiry has remained pending since the order at Annexure 'C' was passed. In short, the inquiry which arose from the Charge Sheet at Annexure 'A' has remained pending since then, or at the very least, has not been completed. There is no controversy on this fact. As against this, the Charge Sheet at Annexure 'B' to the petition did proceed, and ultimately resulted in a report of the Inquiry Officer whereby the petitioner has been partly exonerated and partly found guilty in respect

of the charges levelled against him under Annexure 'B'. However, this fact, that is to say that he is partly exonerated and partly found guilty, is only communicated to the Court with reference to the report of the Inquiry Officer which is not on the record of the case, and when presented to the Court for perusal during the course of hearing, was found to be incomplete. These facts have been noted only in order to understand the inter-play of the various factual aspects while discussing the legal contentions discussed hereinafter.

2.4 As aforesaid, the impugned order at Annexure 'D' compulsorily retiring the petitioner has been passed under rule 161 (1) of the BCSR, and this fact is also not in dispute.

3. One of the principal contentions raised by the petitioner is that on a true and correct interpretation of the rule 161 of the BCSR, the petitioner could be compulsorily retired only on or after the date on which he attains the age of 55 years. On the facts of the case, it is not disputed that the petitioner has been compulsorily retired, precisely with effect from the date when he would have attained the age of 50 years.

3.1 In the context of the controversy, the relevant provisions of Rule 161 of BCSR require to be examined.

3.2 Rule 161 (1) [so far as relevant for the purpose of the present discussion] reads as under:

"161.(1)(a). Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV servant, is the date on which he attains the age of 58 years.

Provided
(i). Deleted
(ii). Deleted

(iii) He may be retained in service after the date of compulsory retirement only with the previous sanction of Government on public grounds which must be recorded in writing.

(aa). Notwithstanding anything contained in clause (a).-

(i). An appointing Authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice:

(1). if he is in Class I or Class II service or post, the age limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age of 50 years, and

(2). if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years, on or after the date on which he attains the age of 55 years;

xxx xxx xxx xxx xxx "

4. The root of the controversy as presented to the Court by the contrary submissions of learned counsel lies in the interpretation of rule 161 (1) (aa) (i) (1) and (2).

4.1 According to the petitioner, since the petitioner was holding the post of Executive Engineer, and since for the purpose of direct recruitment to this post, the age limit is 40 years, he would be governed by clause (2). In this context, it requires to be noted that the respondent Board has framed Regulations under section 74 (c) of the Gujarat Housing Board Act, 1961. These Regulations are called the Gujarat Housing Board Services Classifications of and Recruitment Regulations, 1981. Part V of these Regulations relate to qualifications, and also govern the procedure relating to recruitment of various posts under the Gujarat Housing Board. In the context of the Executive Engineer (the petitioner), Regulation 4 of Part V is relevant. When we see the said regulation 4 (4) (i), there cannot be any doubt that in the case of an Executive Engineer, to be eligible for appointment by direct selection, he should be not more than 40 years of age.

4.2 It is, therefore, obvious that in the context of

Rule 161, when the aforesaid clauses (1) and (2) are read in juxtaposition, it would be clause (2) which would be applicable, since the phrase "the age limit for the purpose of direct recruitment to which is below 40 years" is applicable to the petitioner. Once it is found that the said clause (2) is applicable to the petitioner, the power conferred by rule 161 can be exercised only on or after the date on which the employee attains the age of 55 years. On the facts of the case, on which there is no dispute, the petitioner has been retired compulsorily precisely on the day when he attained the age of 50 years, and this appears to have been done on the basis that it would be clause (1) which would be applicable to him.

4.3 As already stated hereinabove, clause (1) cannot possibly apply to the petitioner inasmuch as, for the post of Executive Engineer, the age limit for the purpose of direct recruitment cannot be said to be below 35 years.

4.4 Thus, on this view alone, the impugned order is required to be quashed and set aside.

5. However, there are other grounds and reasons which would also strike at the root of fundamental power to pass the impugned order.

5.1 In the context of the aforesaid Rule quoted hereinabove, and particularly in the light of Rule 161 (1) (aa), the first and fundamental principle on which the power of compulsory retirement can be exercised is when the Appointing Authority is of the opinion that it is in the public interest to do so. In other words, the satisfaction of the appointing authority is the fundamental criteria upon which an order of compulsory retirement can be passed. This satisfaction of the appointing authority, viz. that it is in the public interest to exercise this power, is not an opinion which can be presumed to exist in the mind of the authority. The very fundamental foundation of the exercise of the power is not only the existence of such an opinion, but the existence of such an opinion which is both expressed and reflected in the resultant order. The contention raised by the learned counsel for the respondent is that such a satisfaction arrived at by the appointing authority can be inferred from the order or from a reading or interpretation of the order. This submission cannot be accepted for the simple reason that what is in public interest, and what is not in the public interest, is not within the parameters of judicial inquiry. If, in

a given case, the appointing authority had expressed its opinion that it is in the public interest not to continue an employee, it would not be open to the Court to question that opinion on merits or by questioning the reasoning process which lead the authority to form such an opinion. If in case such an opinion had been expressed, it would not be open to the employee to challenge the said opinion on the ground that the opinion was not reasonable, saying that such an opinion has not been formed on the basis of proper material or that the material before the authority could not lead the authority to reasonably form such an opinion. The essence of the discussion is, therefore, that there must be both the formation of the opinion on the part of the appointing authority and also an expression of the opinion on his part before the power of compulsory retirement can be exercised.

6. There is yet another aspect of the matter upon which the impugned order becomes vulnerable.

6.1 Even when the impugned order is examined, certain fatal defects come to the fore front, without going into the merits or otherwise of the facts stated in the said order.

6.2 As stated hereinabove, two charge sheets were issued to the petitioner. Both of them had been issued in the year 1997. Yet, when the impugned order is passed on 9th December 1998, the same refers only to a criminal case pending against him, refers only to a suspension order issued to the petitioner, but it does not refer to either of the two charge sheets nor does it refer to the pendency of two inquiries against the petitioner. This aspect is relevant from only one particular point of view. There is no doubt that the Court can not look into the validity or legitimacy of the order on merits. Yet if, on fundamental principles, it is found that the order is passed on irrelevant considerations or extraneous considerations or has been passed without noting the relevant and obviously extant facts, the order becomes vulnerable.

7. Another aspect which emerges on the face of the said order is that the appointing authority has arrived at a specific conclusion, viz. "it is established that his integrity is doubtful". Once again, it must be noted that it is not open to the Court to examine or test this factual observation on merits, or to test the validity of the observation as if such an observation is the subject matter of an appeal. This factually can, and must be,

accepted on its face value provided only that it is based on some material before the authority, from which such a conclusion could possibly be drawn. Even a casual perusal of the impugned order discloses that the appointing authority has taken it for granted that when the petitioner was stationed at Surat, he was responsible for various defects in constructions (which are enumerated in detail in the impugned order) and due to this, the walls of the constructions suffered small and large cracks of a serious nature, on account of which the reputation of the respondent-Board suffered. It requires to be noted that all the aforesaid facts have been recorded by the appointing authority in the impugned order as findings of fact as if these have been arrived at by the authority on the basis of some inquiry or the judgment in a criminal case. As stated hereinabove, neither of the two charge sheets issued to the petitioner have been noted or observed in the impugned order, instead of which, what is noted is pendency of one criminal case. It would, therefore, appear that merely because one criminal case has been filed against the petitioner and which was pending on the date of the impugned order, the appointing authority thought it fit to come to a conclusion that the petitioner's integrity is doubtful. This conclusion is also doubtful when regard is had to the fact that the appointing authority who has passed the impugned order of compulsory retirement, is himself the complainant in the complaint which resulted in the criminal case which was pending on the date of the impugned order.

7.1 To conclude, therefore, the only basis for passing the impugned order is a factual finding recorded by the authority that the petitioner's integrity is doubtful, and this finding is based only upon the pendency of a criminal case wherein the appointing authority himself is the complainant. Further more, the impugned order does not take into account other relevant factors such as the two charge sheets issued to the petitioner and the consequential inquiries [whether it be one inquiry or two].

7.2 It would also be relevant to note that the impugned order does not disclose that any of the past confidential reports of the petitioner have been examined by the said authority. It would therefore appear that there is nothing adverse to be found in the petitioner's CRs. This would also indicate that the conclusion as to doubtful integrity is based on nothing but pendency of a criminal case wherein the authority himself is the complainant. It is in this context of the aforesaid

situation that the relevant law has to be examined.

7.3 In the case of State of Gujarat v/s. Suryakant Chunilal Shah reported in (1999) 1 SCC 529, the Supreme Court held that while considering the compulsory retirement of employees, public interest is the primary consideration, that efficiency and honesty is to be assessed on the basis of material on record, of which confidential reports are important inputs. In that case, when the Supreme Court noticed that no tangible material was found against the employee except that he was involved in two criminal cases, it held that pendency of the cases in itself was not sufficient to pass an order of compulsory retirement. It was further held that the Review Committee (the authority) exceeded its jurisdiction in doubting the respondent's integrity merely on the basis of pending criminal cases when there was no indication of doubtful integrity in the confidential reports, the impugned order of compulsory retirement was held to be bad. In the context of this decision, it requires to be noted as aforesaid, that the confidential reports of the petitioner were either not placed before the authority, and in case they were so placed, they did not contain any adverse remarks whatsoever.

7.4 In the case of State of Gujarat v/s. Umedbhai M. Patel reported in (2001) 3 SCC 314, the Supreme Court found that the order of compulsory retirement and its validity must be examined in the context of the reasons stated in the said order. If the reasons in the order are extraneous, particularly where there are no adverse entries in the confidential reports, the same cannot be said to be relevant material so as to justify such an order. On the facts of that case, the Supreme Court also found that where a departmental inquiry into certain charges had been initiated but later dispensed with, is also a relevant fact which would weigh against the validity of such an order. As aforesaid, on the present facts, although two charge sheets were issued to the petitioner, it appears that only one inquiry was completed, and the other was either not completed till the date of the impugned order, or abandoned.

7.5 In the case of N.C. Dalwadi vs. State of Gujarat [AIR 1987 SC 1933], the Supreme Court held interalia (in paragraph 10 of the said decision) that although the words 'in the public interest' are not there but such power to direct premature compulsory retirement at the age of 55 years can be exercised subject to the conditions indicated in Col. J.N. Sinha's case, one of

which is that the concerned authority must be of the opinion that it is in the public interest to do so.

8. In the premises aforesaid, it is found and held that the impugned order of compulsory retirement at Annexure 'D' to the petition is illegal and bad in law, and is quashed and set aside. Consequently, it is found that the petitioner would be entitled to remain in service upto the age of completion of 58 years and be entitled to salary and allowances in that regard. It is clarified that this shall be subject to the result of any departmental inquiry, subject to the result of any criminal case pending against the petitioner, and subject to a valid order passed under Rule 161 of BCSR, and such consequential action which the employer may choose to take on that basis.

9. Rule is accordingly made absolute with no orders as to costs.

10. At this stage, learned counsel for the respondent prays that the present judgment and order be stayed, with a view to enable the respondent to challenge the same. On the facts and circumstances of the case, stay of operation and implementation of the present judgment and order is granted upto 9th December 2002 with a clarification that there shall be no further extension of the same.

sd/-

(Y.B. BHATT, J.)

mathew